

**F. THE WHT REFUND APPLICANTS DID NOT SUFFER TAX THAT EXCEEDED THE FINAL TAX DUE UNDER A DOUBLE TAXATION TREATY**

36. As explained in paragraphs 6 and 7 above, section 69 B(1) of the WHT Act requires a WHT refund applicant to show that the tax withheld from the dividends received by it “*exceeds the final tax due under a double taxation treaty*”.
37. For the reasons set out above, the WHT Applicants did not own any shares in Danish companies, did not receive any dividends and no tax was withheld by any Danish company on their behalf. Accordingly, no tax was suffered by the WHT Applicants which might be said to exceed the final tax due under any double taxation treaty.
38. In any case, the WHT Applicants were not entitled to any different treatment as a result of any double taxation treaty because they were not eligible for relief under any double taxation treaty.
39. The applicable double tax treaties are set out in paragraph 9 of the RRAPOC (the “**Double Tax Treaties**”). In order to be eligible for relief under them, each of the Double Tax Treaties required WHT refund applications to satisfy three requirements:
  - 39.1 they were resident in a Contracting State;
  - 39.2 they were the “*beneficial owner*” of dividends paid by a resident of another Contracting State;<sup>28</sup>
  - 39.3 the transactions giving rise to an application for a WHT refund were not created for the sole or main purpose of securing favourable tax treatment under the double tax treaty; and
  - 39.4 if the WHT refund applicant is a US pension fund, the pension fund satisfied the requirements under the Convention between the Government of the United States of America and the Government of the Kingdom of Denmark for the

<sup>28</sup> Although the Agreement between the Government of Malaysia and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income (the “**Denmark-Malaysia Treaty**”) does not expressly set out the requirement of beneficial ownership, it was an implicit requirement under Article 10 of the Denmark-Malaysia Treaty.

Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income (the “**Denmark-US Treaty**”).

40. The WHT Refund Applicants did not satisfy these requirements for the reasons set out below.

**The WHT Applicants were not “beneficial owners” of a dividend**

41. The meaning of the term “*dividend*” in each of the Double Tax Treaties is similar to that under Danish law.<sup>29</sup> As the Commentary on the OECD Model Tax Convention on Income and Capital (2014)<sup>30</sup> (“**OECD Commentary**”) explains at page 191 (paragraph 24), “*dividends*” are distributions of profits by companies the title to which is constituted by shares.
42. The WHT Applicants did not receive any “*dividends*”:
- 42.1 The WHT Applicants did not own any shares in the relevant Danish companies.
- 42.2 Any amounts received by the WHT Applicants were not income from shares.
- 42.3 Any amounts received by the WHT Applicants were not paid by Danish companies, either directly or through a chain of custody.
- 42.4 Any amounts received by the WHT Applicants were not the distribution of profits of Danish companies.
43. Further or alternatively, for the reasons set out below, the WHT Applicants were not the “*beneficial owners*” of the dividends they claimed to have received.
44. The concept of “*beneficial owner*” in the Double Tax Treaties derives from the OECD Model Convention, as explained in the commentary thereto,<sup>31</sup> to which a Danish Court would have regard in determining whether a WHT refund applicant was the beneficial owner of dividends received based on all relevant facts and circumstances of the case.

<sup>29</sup> See paragraph 13 above.

<sup>30</sup> Each of the Danish Double Tax Treaties are based on the OECD Articles of the Model Convention with Respect to Taxes on Income and on Capital (the “**OECD Model Convention**”).

<sup>31</sup> A Danish Court will take into account versions of the commentary that are issued after the date of any particular WHT Application.



45. In accordance with the OECD Model Convention and the commentary thereto, a Danish Court would consider the following non-exhaustive factors relevant to determine whether a WHT refund applicant was the beneficial owner of a dividend:

45.1 whether the WHT refund applicant had the power freely to decide how to dispose of the income said to constitute a dividend;

45.2 whether the WHT refund applicant's power to use and enjoy the dividend was constrained by an obligation – either legal or economic – to pass on the economic benefit of the amount received to another person;

45.3 whether the WHT refund applicant was an agent or nominee or conduit for passing the benefit of the dividend (or a very substantial portion thereof) to a third party;

45.4 whether the WHT refund applicant received the dividend as part of a transaction between related parties that was not at arm's length;

45.5 whether the WHT refund applicant was an entity of commercial substance (for example, by reference to whether it had its own business, staff, employees or offices);

45.6 whether a holding company (or other affiliated entity or individual) exercised a level of control over the WHT refund applicant that was beyond the control and management that one would normally expect;

45.7 whether the WHT refund applicant was set up for the sole or main purpose of obtaining the benefit(s) of a double tax treaty.

46. Pending disclosure, SKAT will rely on the following facts and matters in support of the allegation that the WHT Applicants were not beneficial owners of dividends:<sup>32</sup>

46.1 The WHT Applicants did not have the power freely to dispose of the dividends.<sup>33</sup>

<sup>32</sup> Even if they did receive any dividend, which is denied for the reasons set out in paragraphs 13 to 31 above.

<sup>33</sup> RRAPOC, paragraph 24(g)(iv).

- 46.2 The WHT Applicants did not retain the economic benefit of the amounts that they received which purportedly constituted dividends. The economic benefit (or the very large majority thereof) was in all cases passed on to another party in the relevant chain of transactions pursuant to a legal or economic obligation.
- 46.3 The WHT Applicants acted as nominee for or conduit passing the benefit of the dividend (or a very substantial portion thereof) to third parties.
- 46.4 The WHT Applicants took no price risk in relation to the shares that they purportedly owned.<sup>34</sup>
- 46.5 Although the Principal WHT Scheme (alternatively, the Solo WHT Scheme, the Donaldson/LaRosa WHT Scheme and/or the Klar WHT Scheme) ostensibly involved a number of independent parties, each of the “buyers”, “sellers”, “stock lenders” and “forward counterparties” were in reality owned, controlled or in league with the core conspirators identified in the RRAPOC, the Schedules thereto and SKAT’s Replies to Defences. The brokers were interposed to give the transactions the false appearance of being at arm’s length between unrelated parties; all the “trades” were centrally arranged as part of a closed loop without the brokers performing a normal broking function of buying and selling in the market.<sup>35</sup> In particular:
- (a) All other participants in the Solo WHT Scheme were owned or controlled by or in league with Mr Shah and the Solo and Elysium Group Companies. The identity of the majority of counterparties in the Solo Model are set out in Schedule 7 to the RRAPOC;
  - (b) The Donaldson/LaRosa WHT Scheme involved at least Messrs Donaldson and LaRosa (who owned and/or controlled the US pension plans that were WHT Applicants), Messrs Stein and Lhote (who owned North Channel Bank), Mr Teraiya (who owned Indigo), Mr Klar (who owned and/or controlled the stock lenders, Sherwood Enterprises Ltd and Potala Trading Ltd), and Messrs Horn, Rajen Shah, Dhorajiwala,

<sup>34</sup> RRAPOC, paragraph 24(e)(v).

<sup>35</sup> RRAPOC, paragraphs 24(e), (e1), 50, 50A, 50AA, Schedule 6A-B, Schedule 7.